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MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

Supreme Court of the United States

October Term, [redacted] 1925

No. [redacted] 247

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, Jr.,
Defendants in Error.

CHAS. S. BELL,
Prosecuting Attorney,

NELSON SCHWAB,
LOUIS SCHNEIDER,
Asst. Prosecuting Attorneys
for the State of Ohio.

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Supreme Court of the United States

October Term, 1924

No. 848

GEORGE H. BEAZELL,

Plaintiff in Error,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, Jr.,

Defendants in Error.

MOTION TO DISMISS OR AFFIRM

Now comes the State of Ohio, one of the defendants in error herein, by Charles S. Bell, the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and moves the court to dismiss the writ of error or to affirm the judgment of the Supreme Court of Ohio, heretofore entered herein.

This application is made under and by virtue of authority of Sections four and five of Rule six of the Rules of this court.

CHAS. S. BELL,
Prosecuting Attorney,

NELSON SCHWAB,
LOUIS SCHNEIDER,
Asst. Prosecuting Attorneys
for the State of Ohio.

MEMORANDUM BRIEF IN SUPPORT OF MOTION

Plaintiff in error raises only one question for the consideration of this court.

IS SECTION 13677 OF THE GENERAL CODE OF OHIO AS AMENDED, AND AS APPLIED IN THE CASE AT BAR, REPUGNANT TO THE FEDERAL CONSTITUTION AS AN EX POST FACTO LAW?

STATEMENT OF FACTS

Plaintiff in error, George H. Beazell, was jointly indicted, tried and convicted with one William H. Chatfield, Jr., on a charge of embezzlement, committed on the 13th day of February, 1923, in the Common Pleas Court of Hamilton County in the State of Ohio. (R. 18 and 24 respectively.)

Plaintiff in error was sentenced to a term of nine years in the Ohio Penitentiary. (R. 31.)

The judgment of the Common Pleas Court was affirmed by both the Court of Appeals of the First Appellate District of Ohio and by the Supreme Court of Ohio. (R. 10 and 45 respectively.)

The indictment in this case was returned by the Grand Jury of Hamilton County, Ohio, on October 25, 1923, and the case was tried in the January Term of the Court of Common Pleas in the year 1924.

At the time the offense was committed, to-wit, the 13th day of February, 1923, Section 13677 of the General Code of Ohio read as follows:

> "13677. PRISONER INDICTED, WHEN TO BE DISCHARGED. When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be tried separately."

Subsequently to said date, to-wit, the 13th day of February, 1923, and prior to the date of the return of the indictment, to-wit, October 25, 1923, the legislature of Ohio on April 5, 1923, amended Section 13677 to read as follows:

> "Sec. 13677. When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants, order that one or more of said defendants shall be tried separately."

Section 2 of said amending act reads as follows:

> "This act shall apply to and affect all pending criminal actions, prosecutions and proceedings, and all causes of such actions, prosecution and proceeding existing at the time of such amendment * * * *"

This amendment was approved by the Governor of Ohio on April 24, 1923, filed in the office of the Secretary of State on April 27, 1923, and became effective on July 27, 1923, and is found in Volume 110 of the Ohio Laws, at pages 301 and 303.

At the time of the passage of this amendment, and for a long time prior thereto, there was on the statute books of Ohio a section known as Section 26 of the General Code which reads as follows:

> "26. EFFECT OF AMENDMENT OR REPEAL ON PENDING ACTIONS. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Application was made by the plaintiff in error to the court for a separate trial under Section 13677 as said section read at the time of the commission of the offense, to-wit, the 13th day of February, 1923. Counsel for the State claimed that Section 13677 as amended applied

to the case of the Plaintiff in Error, which view the court adopted and overruled the application of Plaintiff in Error for a separate trial, to which ruling the Plaintiff in Error then and there excepted, on the ground that applying Section 13677, as amended, made said section an ex post facto law, violative of Section 10 Article I of the Constitution of the United States. (R. 21 and 22.)

ARGUMENT

The Court of Appeals of the First Appellate District and the Supreme Court of Ohio both held that by virtue of Section 26 of the General Code of Ohio, Section 13677, as amended, applied to the case of the Plaintiff in Error, and that said application of said statute as amended violated no provisions of the state or federal constitutions.

It is respectfully contended and urged upon this court that the application of Section 13677, as amended, to the case of the Plaintiff in Error violates no provision of the federal constitution for the following reasons, to-wit:

1. That Section 13677 of the General Code relates solely to procedure.

2. That Plaintiff in Error had no vested right in and to a separate trial.

3. That Section 13677, as amended, and in force at the time of the indictment and trial of Plaintiff in Error was not, as applied to his case, an ex post facto law repugnant to the federal constitution.

The rule is well established that the legislatures of the various states have the right to change statutes relating to procedure at pleasure and that it is violative of no federal provision so to do.

It is equally well established that the legislatures of the various states have not the right to take away from a defendant a vested right by amendment or repeal of a statute between the time the alleged offense was committed and the time of his trial, and the test as to whether a statute relates merely to procedure or to vested rights has been fully enunciated by this court on many occasions. In Hopt vs. Utah, 110 U. S. 574, the court at page 590 uses this language:

> "* * * * But alterations which do not increase the punishment nor change the ingredients of the offense or eliminate facts necessary to establish guilt, but leaving untouched the nature of the crime or the amount or degree of proof essential to conviction only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure."

The court again laid down the rule in Thompson vs. Missouri, 171 U. S. page 380.

In Mallett vs. North Carolina, 181 U. S., 589, the court reiterates the rule, however, in that case the decision was based primarily on the fact that the plaintiff in error had not properly raised the federal question.

This is the rule which has been followed by the courts of last resort of various states so far as we have been able to find and is also laid down by the text writers.

Measuring Section 13677, as amended, by this rule, we respectfully contend that this statute, as amended, did not increase the punishment, change the ingredients of the offense, eliminate facts necessary to establish guilt, and therefor relates to procedure only and is such a statute in which no person can have a vested right, and the state may regulate at pleasure.

CONCLUSION

The question involved in this case has been so uniformly and thoroughly settled in favor of the contention made by the State, that it is respectfully submitted that the motion to dismiss or affirm should be granted.

Respectfully submitted,

CHAS. S. BELL,
Prosecuting Attorney.
Hamilton County, Ohio.

NELSON SCHWAB,
LOUIS SCHNEIDER,
Asst. Prosecuting Attorneys.

Attorneys for State of Ohio.